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No. 87-385

In The

Supreme Court of the United States

October Term, 1987

JANICE PAUL, a/k/a JANICE PEREZ,
Petitioner,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY
OF NEW YORK, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Is the Jehovah's Witnesses' practice of shunning protected under the free exercise provisions of the United States Constitution and the Washington State Constitution?

a. Would imposition of tort liability for intangible or emotional harms caused by the religious practice of shunning burden the free exercise of religion?

b. Does the religious practice of shunning constitute a sufficient threat to the peace, safety, or morality of the community as to warrant imposition of tort liability for intangible or emotional harm caused by the practice?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner Janice Paul, a/k/a Janice Perez and the respondents, Watchtower Bible and Tract Society of New York, Inc.; Watchtower Bible and Tract Society of Pennsylvania; Troy A. Mertell and Jane Doe Mertell; Orville Crosswhite and Jane Doe Crosswhite.

Respondent Watchtower Bible and Tract Society of New York, Inc., has no other parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 819 F.2d 875 (9th Cir. 1987).

STATEMENT OF FACTS

For the purposes of this brief in opposition, the respondents incorporate by reference the statement of facts found in the Ninth Circuit's opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

1. *There are no special and important reasons for granting the petition.*

The Ninth Circuit's decision is not in conflict with the decision of another federal court of appeals or a state court of last resort on the same matter. Moreover, this case does not involve an important question of federal law which has not previously been settled by the Supreme Court. Nor is it in conflict with applicable decisions of the Supreme Court. On the contrary, the issue of the free exercise of religion has been thoroughly addressed in

previous decisions by the Supreme Court. *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Gillette v. U.S.,* 401 U.S. 437 (1971); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Murdock v. Pennsylvania,* 319 U.S. 105 (1942); *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Hamilton v. Regents of the University of California,* 293 U.S. 245 (1934); *Davis v. Beason,* 133 U.S. 333 (1890); *Reynolds v. U.S.,* 98 U.S. 145 (1879). The Ninth Circuit's decision in this matter is in accord with the Supreme Court's decisions in those cases.

2. *The Ninth Circuit Court of Appeals was correct in deciding that the imposition of tort liability for intangible or emotional injuries resulting from the religious practice of shunning would unconstitutionally restrict the free exercise of religion.*

The court of appeals held the practice of shunning did not constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention through the imposition of tort liability. Although the petitioner naturally disagrees with the conclusion reached by the court of appeals, she presents no authority in her petition to demonstrate the decision was in error. On the contrary, the Ninth Circuit correctly decided the case on the basis of established precedent from the Supreme Court.

The first amendment to the Constitution of the United States provides, in part:

> Congress shall make no law . . . prohibiting the free exercise [of religion] . . .

This amendment is applicable to the states through the due process clause of the 14th amendment. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). Further, as noted by the court of appeals, "state laws whether statutory or common law, including tort rules, constitute state action." *Paul v. Watchtower Bible and Tract Society of New York,* 819 P.2d 875, 880 (9th Cir. 1987).

The free exercise clause operates to protect not only individuals but also churches. *Presbyterian Church v. Mary Elizabeth Blue Hall Presbyterian Church,* 393 U.S. 440 (1969); *Kreshik v. St.*

Nicholas Cathedral, 363 U.S. 190 (1960); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952). But, while its protection to believe is absolute, its protection of freedom to act is not. *Wisconsin v. Yoder,* 406 U.S. 205, 220 (1972). Since the petitioner's claim for relief is the imposition of tort liability upon the Jehovah's Witnesses church and its members due to their practice of shunning, the Ninth Circuit correctly set out to determine whether the Jehovah's Witnesses' freedom to act is protected under the free exercise provisions of the Federal and State Constitution. The circuit court was guided in this inquiry by previous decisions of the Supreme Court concerning the free exercise of religion.

The Supreme Court, in *Sherbert v. Verner,* 374 U.S. 398 (1963), described the test which governmental action, burdening the free exercise of religion, must meet. Such an imposition must be justified by a "compelling state interest in the regulation of a subject within the state's constitutional power to regulate." *Sherbert,* 374 U.S. at 403. In that case, the Supreme Court expounded upon the concept of compelling state interest as follows:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

Sherbert v. Verner, 374 U.S. 398, 406 (1963), (quoting *Thomas v. Collins,* 323 U.S. 516, 530 (1945))

In applying the *Sherbert* test here, the court of appeals made the following inquiries:

1. Would the imposition of tort liability burden the free exercise of religion by the Jehovah's Witnesses?
2. If so, is such a burden justified because of a compelling state interest?

The court of appeals correctly determined that the imposition of tort liability would burden the free exercise of religion by the Jehovah's Witnesses in this case.

It should be noted, as was observed by the court of appeals, that shunning is an important and integral part of the teaching and practice of the Jehovah's Witnesses. This practice has its roots in various passages of Christian scripture. See *Paul v. Watchtower Bible and Tract Society of New York,* 819 F.2d 875, 877 (9th Cir. 1987). The practice is indeed a doctrine which is basic and essential to the beliefs of the Jehovah's Witnesses. Although petitioner alleges there is more to be seen behind the doctrine of shunning than a religious motive, as the court of appeals noted in footnote 7, it was "neither alleged nor shown that members of the church hierarchy were motivated by reasons unrelated to their interpretation of the dictates of their religion." 819 F.2d at 883.

Petitioner's suggestion that the Jehovah's Witnesses' position on this subject is motivated by some malice they allegedly have toward her is unfounded. As the district court stated: "[I]t is highly unlikely that the Church cares a whit about plaintiff. The obvious motivation, rather, is to maintain discipline over the ranks of those persons who still remain within the membership." Appendix to petitioner's brief at 35. That the teachings and actions with respect to disassociated persons are based on scripture was accepted by the Ninth Circuit as well. *Paul,* 819 F.2d at 879.

The affidavit of James Penton, relied upon by petitioner, establishes nothing. Petitioner chooses to draw "inferences" of malice from Penton's opinions, but ignores the clear scriptural basis of the shunning practice.

The petitioner's statement that the Church's "motives are more organizational than spiritual" makes no sense. The Church is a recognized, theocratic organization motivated by its spiritual commission. There is no distinction between its organizational and spiritual actions, especially when applying scriptural teachings. In short, the conduct petitioner attacks is based unquestionably on scripture and is engaged in by persons who voluntarily accept that scriptural teaching and put it into practice.

Having in mind the central nature and purpose of the shunning policy, the court of appeals was likewise correct in determining that the imposition of tort liability would *directly* interfere with the free exercise of religion by the Church and its members.

Paul, 819 F.2d at 880. If the Church must be made to pay in damages for carrying out its essential teachings and practices, its religious liberty and that of its members are as unreasonably burdened as they would be by an injunction or a criminal penalty. The only difference would be in the form of the penalty, not in the substance.

Having determined that the imposition of tort liability upon the Church and its members would be a substantial burden upon their religious freedom, the court of appeals turned to whether such a burden would be justified because of a "compelling state interest."

As stated earlier, the liberty to act in the name of religion is not absolute. Churches and their members do not have an absolute right to carry their religious beliefs into practice, regardless of how central these beliefs may be to their religion or how sincerely they may hold these beliefs. Religious liberty is nevertheless a "preferred freedom" under our Constitution. *Murdock v. Pennsylvania,* 319 U.S. 105, 115 (1943). As a result, the Court has required that any interference with that freedom be justified only by showing that the religious practice in question is in the category of "the gravest abuses, endangering paramount interests." *Sherbert v. Verner,* 374 U.S. 398, 406 (1960) (Quoting *Thomas v. Collins,* 323 U.S. 516, 530 (1945)). As the court of appeals pointed out, those cases in which restrictions by governmental bodies upon religious practices have been upheld are very few. *Paul v. Watchtower Bible and Tract Society of New York,* 819 F.2d 875, 883 (9th Cir. 1987). They are illustrative of the extreme ends to which religious practices must go before restrictions upon them will be approved.

A landmark case of the Supreme Court on this issue is *Reynolds v. U.S.,* 98 U.S. 145 (1979). There the Court upheld a criminal conviction for polygamy.

In another case involving polygamy, *Davis v. Beason,* 133 U.S. 333 (1890), the Court described those situations in which religious liberty could be limited as those involving "acts inimical to the peace, good order and morals of society." *Davis,* 133 U.S. at 342.

In *Prince v. Massachusetts,* 321 U.S. 158 (1944), the Court upheld, over free exercise objections, the criminal conviction of a Jehovah's Witness for violation of the child labor laws by utilizing a nine year old girl to sell religious tracts on the public streets as part of a religious ministry. The Court pointed to the evils of "...the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street." *Prince,* 321 U.S. at 169.

In addition, the Supreme Court has recognized permissible limitations on religious activity in cases closely related to the national defense. *Gillette v. United States,* 401 U.S. 437 (1971); *Hamilton v. Regents of the University of California,* 293 U.S. 245 (1934).

The Jehovah's Witnesses' practice of shunning for which the petitioner seeks to impose tort liability is far removed from the type of religious activity which the Supreme Court has held may be precluded or limited. What is present here, at most, is a private intangible injury resulting from religious beliefs and practices which have their effect, not upon the public as a whole, but solely within the society of the church members.

The Petitioner argues that tort judgments should be allowed to deter and compensate the type of harm she claims she has suffered: "Tort judgments represent the state interest in providing a substitute for private redress." Petitioner's brief at 9. This statement puts the lesser before the greater. The Constitution, as our nation's organic law, represents the people's fundamental interest in guaranteeing religious freedom. Jehovah's Witnesses have a constitutionally protected freedom to follow the Bible's teaching on who they should view as acceptable and unacceptable associates. They should not be forced, under threat of tort liability, to abandon their Bible-based standards. They should be allowed to follow their understanding of the Bible's teachings on rules and conduct designed to preserve the spiritual health and strength of their congregations. Bizarre, unprecedented tort theories do not override fundamental constitutional rights.

Finally, petitioner repeatedly makes reference to her "constitutional right" to freely leave the organization. She provides no support, legal or otherwise, for her assertion of this "constitutional right." In fact, she freely left the organization, as anyone can. What she disagrees with is the behavior of those she left behind. The Ninth Circuit put this whole case in proper perspective when it said: "The members of the Church Petitioner decided to abandon have concluded that they no longer want to associate with her. We hold that they are free to make that choice." *Paul v. Watchtower Bible and Tract Society of New York,* 819 F.2d 875, 883 (9th Cir. 1987). The district court in essence reached the same conclusion: "[T]he gravamen of [Paul's] action is that people won't talk to her. If there exists a 'right to be talked to,' neither the parties nor the Court are entirely certain of its foundation." Appendix to petitioner's brief at 36. The Constitution no more gives petitioner the "right" to the association of her former Witness acquaintances than it requires them to associate with her.

CONCLUSION

Janice Paul's Petition satisfies none of the criteria for review set forth in Supreme Court Rule 17.

The First Amendment of the United States Constitution and free exercise protections of the Washington Constitution provide an insurmountable barrier to Petitioner's claim for damages.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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